Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Kevin J. Kerrigan IA Part 10
Justice

Daler Singh, DBA Gilzian Enterprise LLC, Danielle Eve Taxi LLC, EAC Taxi LLC, DEC Taxi LLC, EC Taxi LLC and Dyre Taxi LLC individually and on behalf of all others similarly situated,

Plaintiffs,

- against -

The City of New York and The New York City Taxi and Limousine Commission,

Defendants.

Index Number: 701402/17

Motion Date: March 8, 2018

Motion Seq. No.: 4

The following papers numbered 116 to 169 read on this motion by the plaintiffs for an order, inter alia, certifying this action as a class action

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	116-148
Answering Affidavits - Exhibits	150-164
Reply Affidavits	170-173
Memorandum of Law	117, 165, 169

Upon the foregoing papers it is ordered that the motion is denied without prejudice to moving again for the instant relief after both sides have moved for summary judgment, if they are so advised, or after the time to do so has expired.

I. Background

Plaintiff Danielle Eve Taxi LLC, plaintiff EAC Taxi LLC, plaintiff DEC Taxi LLC, plaintiff EC Taxi LLC, plaintiff Chips Ahoy Taxi LLC, plaintiff ECDC Taxi LLC, and plaintiff Dyre Taxi LLC successfully bid for New York City corporate wheelchair accessible taxi medallions at a public auction held on November 13, 2013. In February, 2014, plaintiff Daler Singh d/b/a Gilzian Enterprise LLC successfully bid for an independent wheelchair accessible taxi medallion at a public auction. Before the auctions, defendant City of New York and defendant New York City Taxi and Limousine Commission (TLC) (collectively the city defendants) made public statements and issued promotional materials concerning medallions, medallion prices, and price trends. In the months prior to auctions held over several years, TLC published reports on the average sale price of both individual and corporate medallions. The plaintiffs allege that the reports issued by TLC contained false, inaccurate, and misleading statements. TLC allegedly exaggerated the price of medallions in public reports while concealing the true prices and made false statements concerning the directional trend in medallion prices.

Plaintiff Singh formed Gilzian Enterprise LLC for the purpose of owning the taxi medallion, which cost the company $821,215. Richard Chipman organized Danielle Eve Taxi LLC, EAC Taxi LLC, DEC Taxi LLC, EC Taxi LLC, Chips Ahoy Taxi LLC, ECDC Taxi LLC, and Dyre Taxi LLC (the Chipman companies) for the purpose of owning two yellow taxi medallions each (a company with two medallions is called a minifleet). The purchase price for the mini-fleets ranged from $2,118,000 to $2,518,000 and totaled $16,426, 000..

After the plaintiffs made their purchases, the value of their medallions allegedly fell, and the plaintiffs attribute their losses not only to alleged fraud committed by the TLC, but also to the TLC's failure to restrict the activity of companies like Uber Technologies, Inc. The plaintiffs allege that a medallion gives them the exclusive right to pick up passengers via "street hail" in certain areas of the city and that Uber infringes on this right by picking up passengers who arrange for transportation through the use of an application on their smart phones.

The plaintiff's third cause of action is for breach of the contractually implied covenant of good faith and fair dealing.The plaintiff's fifth cause of action is for rescission of the auction sales transactions. The defendants submitted a motion to dismiss the complaint on July 11, 2017.Pursuant to the order of the Court issued on September 21, 2017, this court, inter alia, denied the motion as it pertained to the third cause of action and dismissed only that part of the fifth cause of action which was based on fraud. The remaining causes of action were dismissed.(*See, Singh v. The City of New York*, 2017 WL 4791469.)

The plaintiffs now move for an order, inter alia, certifying this action as a class action.

II. Class Action Certification

A. CPLR 901 and 902

The court notes initially that the federal class action statute and federal cases applying it have relevance in deciding whether an action may be certified under New York State class action law. "New York's class action statute (CPLR 901–909) has much in common with Federal rule 23 . The prerequisites to the filing of a New York class action are virtually identical to those contained in rule 23***. (*Colt Indus. S'holder Litig. v. Colt Indus. Inc.*, 77 NY2d 185, 194 [citations omitted].)

CPLR 901 and 902 specify the factors which a court must consider before permitting class action certification. (*See*, *Negrin v. Norwest Mortgage, Inc.*, 293 AD2d 726; *Ackerman v. Price Waterhouse*, 252 AD2d 179.) "A class action may be maintained in New York only after the following five prerequisites of CPLR 901(a) have been met: (1) the class is so numerous that joinder of all members is impracticable; (2) common questions of law or fact predominate over any questions affecting only individual members; (3) the claims of the representative parties are typical of the class as a whole; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) the class action is superior to other available methods for the fair and efficient adjudication of the controversy ***. Once these prerequisites are satisfied, the court must consider the factors set out in CPLR 902, to wit, the possible interest of class members in maintaining separate actions and the feasibility thereof, the existence of pending litigation regarding the same controversy, the desirability of the proposed class forum and the difficulties likely to be encountered in the management of a class action ***." (*Ackerman v. Price Waterhouse, supra*, 191;*Cooper v. Sleepy's, LLC*, 120 AD3d 742)

CPLR 902 provides that the court may permit a class action to be maintained only if it finds that all of the prerequisites under CPLR 901 have been satisfied. (*See*, *Cooper v. Sleepy's, LLC, supra.*) The plaintiff has the burden of showing that the criteria of CPLR 901 and 902 have been satisfied. (*Cooper v. Sleepy's, LLC, supra; Globe Surgical Supply v. GEICO Ins. Co.*, 59 AD3d 129; *Bettan v. Geico General Ins. Co.*, 296 AD2d 469; *Ackerman v. Price Waterhouse, supra*; *Canavan v. Chase Manhattan Bank*, 234 AD2d 493.)

B. The Merits As a Factor

The court may also take into consideration the merits of the action as another factor before permitting class action status, though to a limited extent. "To the extent that inquiry into the merits of a claim is appropriate before certification of a class, the inquiry is to determine whether on the surface there appears to be a cause of action for relief which is neither spurious nor sham." (*Simon v. Cunard Line Ltd.*, 75 AD2d 283, 288; *Super Glue Corp. v. Avis Rent A Car Sys., Inc.*, 132 AD2d 604; *Brandon v. Chefetz*, 106 AD2d 162.) In *Wal-Mart Stores, Inc. v. Dukes* (564 U.S. 338), The United States Supreme Court has removed any doubt about the propriety of looking into the merits of the case at certification. (Newberg on Class Actions, §7.14.)

In the case at bar, the plaintiffs seek certification on the causes of action based on the implied promise of good faith and fair dealing. "Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. Encompassed within the implied obligation of each promisor to exercise good faith are any promises which a reasonable person in the position of the promisee would be justified in understanding were included.. This embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. (*Dalton v. Educ. Testing Serv.*, 87 NY2d 384, 389 [Internal quotation marks and citations omitted].) "[T]he undertaking of each promisor in a contract must include any promises which a reasonable person in the position of the promisee would be justified in understanding were included ***"(*Havel v. Kelsey-Hayes Co.*, 83 AD2d 380, 382, quoting 11 Williston, Contracts [3d ed.], § 1295, p. 37).

C. The Court's Power to Control the Timing of the Certification Motion

CPLR 902 provides in relevant part: " Within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained."

The sixty day period is not an inflexible one. The court in a class action has broad powers to control the course of the litigation * * *." (*City of Rochester v Chiarella*, 86 AD2d 110, 115, affd 58 NY2d 316; see, CPLR 907; *Matter of Colt Industries Shareholder Litigation*, 155 AD2d 154, mod 77 NY2d 185; *Friar v Vanguard Holding Corp.*, 78 AD2d 83.) While the intent of CPLR 902 is that "a determination as to the appropriateness of class action relief shall be promptly made at the outset of the litigation" (*see, O'Hara v Del Bello*, 47 NY2d 363, 368) and while a plaintiff risks the denial of a motion for class action relief for undue delay in making the motion (*see, Hernandez v Gateway Demolition Corp.*, 263 AD2d 467), the court has the power to decide when the

application may properly be brought. "[A] trial court has discretion to extend the deadline upon good cause shown ***such as the plaintiff's need to conduct preclass certification discovery to determine whether the prerequisites of a class action set forth in CPLR 901(a) may be satisfied ***." (*Rodriguez v. Metro. Cable Commc'ns*, 79 AD3d 841, 842.)The court also may deny a motion for class action certification as premature before the completion of relevant discovery. (*See, Geiger v American Tobacco Co.*, 252 AD2d 474; *Becker v Empire of Am. Fed. Sav. Bank*, 155 AD2d 923; *Spatz v Wide World Travel Service, Inc.*, 80 AD2d 519.)

In the case at bar, the defendants seek to postpone the determination of class certification until after the completion of discovery: "Discovery in this case is still at its very early stages. Defendants anticipate that information received during discovery will be probative on plaintiffs' motion for class certification. Based on that fact, this Court should entertain staying its decision on plaintiffs' motion for class certification until after discovery is complete." (Memorandum of Law, p8, fn 6.) The court agrees that its determination should be postponed until after the completion of discovery. "Specifically, discovery may be required in either or both of two circumstances: when the facts relevant to any of the certification requirements are disputed or when the opposing party contends that proof of the claims or defenses unavoidably raises individual issues." (Newberg on Class Actions, §7:15.[Internal quotation marks and citation omitted].) In the case at bar, the facts relevant to the certification requirements are disputed. The defendants dispute, for example, whether the typicality requirement can be met, arguing that class members did not necessarily purchase their medallions for the same reasons and with the same sophistication. "Despite essential sameness of event and legal theory, *** a number of cases have denied certification where significant factual variations existed between the class representative's situation and that of other class members. (Alexander, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, C901:6). The defendants alleged that Richard Chipman " is a large medallion owner who has his hand in every aspect of the industry, including medallion sales, financing, insurance, and leasing" and that he is "by no means a naive bidder." (Defendants' Memorandum of Law, p. 10.) There is also a dispute concerning whether individual issues predominate over common issues, such as what were the reasonable expectations of each medallion purchaser. In establishing a breach of the covenant of good faith and fair dealing, the plaintiff must prove the justifiable understanding of " a reasonable person in the position of the promisee." (*Havel v. Kelsey-Hayes Co.*, *supra*, 382.) In the case at bar, the plaintiffs did not show that the "position of the promisee" is unvarying for each medallion purchaser, and individual differences in knowledge, experience, and financial sophistication may have to be taken into account. (The court notes that the parties have not yet fully argued the issue, and the court does not decide it here.)

Discovery before certification may be certification related or merits related or both (Newberg on Class Actions§ 7:14.) The trend is not to limit pre-certification discovery solely to the certification factors, (Newberg on Class Actions§ 7:14.). "Recognition that the certification/merits distinction may be porous suggests that certification-related discovery may often overlap with merits discovery. That conclusion is furthered by the fact that dispositive motions are often decided before the certification motion." (Newberg on Class Actions §7:17.) In the case at bar, discovery related to certification will overlap merits discovery, and the court will refrain from deciding the certification motion until after the completion of both forms of discovery.

Postponing the determination of the certification motion until after the conclusion of discovery will also permit the court to decide motions for summary judgment prior to reaching certification issues, if that will even be necessary.

Newberg on Class Actions, the authoritative text in the field, provides an excellent discussion concerning the timing of the class certification motion, and, as relevant to the case at bar, the increasing tendency of the courts to postpone the class determination until after the determination of dismissal motions: "[T]he trend in the federal courts over the past few decades has been to push the certification decision later into the case and hence to decide dispositive motions prior to the certification motion. Courts have made rulings on a wide variety of motions prior to, or simultaneously with, class certification determinations, including motions to dismiss [and] motions for summary judgment***".(Newberg on Class Actions §7:8 [Emphasis added.) While there are pros and cons to deciding the certification question before dispositive motions, "[c]ourts deciding dispositive motions before certification *** rely on efficiency concerns, noting that if a plaintiff's case clearly lacks merit and can be disposed of quickly, the court and parties avoid the expense of adjudicating a class suit. Moreover, avoiding certification saves the costs of class notice ***." (Newberg on Class Actions §7:8.)"Given that policy concerns cut different ways in different circumstances, a court's decision to consider dispositive motions before or after a ruling on class certification depends greatly on the individual circumstances of the particular case.That said, the emerging trend in the courts appears to be to decide dispositive motions prior to the certification motion" (Newberg on Class Actions §7:8.) "[T]he Supreme Court's 2011 decision in Wal-Mart [*Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338] authorized courts to look at the merits of a case in deciding the certification motion; that look at the merits may be aided by discovery, hence forestalling the certification decision to a point not dissimilar from the summary judgment point of a lawsuit." (Newberg on Class Actions §7:9.)"[C]ourts have been willing to rule on motions for summary judgment prior to class certification in circumstances in which it would facilitate efficient resolution of the case." (Newberg on Class Actions §7:10. [Emphasis added.) "In sum, while summary judgment motions generally do not come "at an early practicable time" in a lawsuit, they nonetheless may

sometimes be adjudicated prior to class certification motions, particularly if the defendant prefers to proceed in that manner, and the plaintiff class is not prejudiced by that approach." (Newberg on Class Actions §7:10.)

In the case at bar, the court finds that the certification motion should be decided simultaneously with motions for summary judgment or after the time for the bringing of such motions has expired. The court will have a better record to decide certification issues, particularly those that concern typicality and merit, if they have to be reached at all. Moreover, there has been a development in the law which occurred after the submission of the instant motion, possibly affecting the merits of the plaintiffs' remaining causes of action.

On May 2, 2018, the Appellate Division, Second Department, affirmed an order and judgment (one paper) of the Supreme Court, Queens County (Allan B. Weiss, J.), entered February 1, 2016 (*Matter of Melrose Credit Union*, - AD3d-, - NYS3d-, 2018 WL 2031341) and another order and judgment (one paper) of the Supreme Court, Queens County (Allan B. Weiss, J.), entered November 19, 2015 (*Glyka Trans, LLC v. City of New York*, - AD3d-, - NYS3d-, 2018 WL 2031439). These hybrid proceedings, combining a special proceeding for Article 78 relief with an action for declaratory relief, were essentially brought to challenge administrative determinations to allow Uber-type vehicles to operate in the City of New York. The Appellate Division affirmed the dismissal of these cases on CPLR 3211 grounds. In *Glyka*, the Appellate Division stated: "We also agree with the Supreme Court's determination that the TLC did not act arbitrarily or capriciously in deciding that the use of a smartphone application to request a ride from an FHV was a form of prearrangement and not synonymous with a street hail. ***. The allegations in the amended petition/complaint demonstrate that there is a significant distinction between a street hail and an electronic request for transportation, whether transmitted to a taxicab or an FHV." (*Glyka Trans, LLC v. City of New York*,, 2018 WL 2031439, 3-4.) These findings of the Appellate Division appear to have relevance to the merits of the plaintiffs' cause of action for breach of the implied covenant of good faith and fair dealing, and the court believes that it is necessary to refrain from deciding the certification motion until after the parties have had a chance to argue the matter on a motion for summary judgment.

In sum, upon looking at the "individual circumstances of [this] particular case" (Newberg on Class Actions §7:8.), the court will refrain from determining certification until after both parties have, if they are so advised, brought motions for summary judgment or the time to do so as expired.

Dated: May 21, 2018

Kevin J. Kerrigan, J.S.C.